85-1534

Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT H. BOLDEN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SMITH AND GELLMAN
SKY E. SMITH
2400 South Dixie Highway
Miami, Florida 33133
(305) 858-1400

Counsel for Petitioner

38pp

QUESTIONS PRESENTED FOR REVIEW

I.

SANSONE VS. UNITED STATES 380 U.S.343, (1965), REQUIRES AN "AFFIRMATIVE ACT CONSTITUTING AN EVASION OR ATTEMPTED EVASION . . ." OF A TAX OWING TO PROVE A VIOLATION OF TITLE 26 UNITED STATES CODE, SECTION 7201, A FELONY. WHEN THE TAXPAYER DID NOT FILE A TAX RETURN FOR THE YEAR IN QUESTION IS THIS REQUIREMENT SATISFIED WHERE AN INDICTMENT MERELY ALLEGES THE CONCLUSION THAT HE CONCEALED, OR ATTEMPTED TO CONCEAL HIS INCOME FROM THE GOVERNMENT?

II.

FEDERAL RULE OF CRIMINAL PROCEDURE (6)(e)(4) PERMITS A MAGISTRATE TO SEAL AN INDICTMENT UNTIL A DEFENDANT IS IN CUSTODY OR RELEASED PENDING TRIAL. IS THE STATUTE OF LIMITATIONS TOLLED WHERE THE GOVERNMENT MISSTATES THE TRUE PURPOSE FOR HAVING THE INDICTMENT SEALED?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced in the appendix

to this Petition. The opinion is reported: *United States vs. Norman C. Edwards, Jr., and Robert H. Bolden, Jr.*, 777 F.2d 644 (11th Cir.1985).

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1985. Bolden did not seek a rehearing, but Norman Edwards did, and his motion was denied by the Court of Appeals on January 21, 1986. This petition has been filed within 60 days of the date that Edwards' petition for rehearing was denied. Rule 20.4, Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1).

STATUTES AND RULE INVOLVED

26 U.S.C. SECTION 7201

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony . . .

26 U.S.C. SECTION 7203

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return

required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . .

FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)(4)

The Federal Magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

On March 2, 1984, a federal grand jury sitting in the southern district of Florida returned an indictment naming Robert H. Bolden, Jr., (Bolden), and two others, in four marijuana-related counts. This first indictment (indictment I), was ordered sealed by a United States Magistrate after an attorney for the government told her that he feared that the defendants would flee if the indictment were made public before they were

apprehended.[1] Ignoring the first indictment the government sought, and obtained, a superseding indictment (indictment II) which was returned on March 22, 1984. This indictment charged the same defendants with the same four marijuana-related counts contained in indictment I, and also charged Bolden with four felony courts of income tax evasion for the years 1977-1980, in violation of 26 U.S.C. section 7201, even though the indictment alleged that for 1979 and 1980, Bolden did not file a tax return.

The dates that indictments I and II were returned are crucial. The date of the last event which gave rise to the charges in the first four counts of both indictments is March 6, 1979. This means that indictment I was returned four days prior to the five year statute of limitations which govern the marijuana counts, 18 U.S.C. section 3282. Indictment II was returned sixteen days after the statutory period.[2] Bolden moved to dismiss the first four counts of indictment II, claiming that they were time barred by 18 U.S.C. section 3282. Bolden reasoned that since the government's true purpose in sealing indictment I was to allow a second government attorney time to present the tax case against him to

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[1]The magistrate later found this claim by the government to be untrue. She found that the government made no effort to apprehend any of the defendants named in the indictment and did not even seek arrest warrants. The magistrate concluded that "there is some merit to the defendant's contention that the first indictment was merely a subterfuge and that the sealing of the indictment . . . was violative of both the letter and the spirit of the law [Fed.R.Cr.P. 6(e)(4)]."

[2]The tax counts are governed by a six year statute of limitations. 26 U.S.C. section 6531.

the grand jury (the attorney was unavailable when Indictment I was considered), then the sealing was improper and not authorized by Rule 6(e)(4). Deliberately ignoring the purpose of the Rule, the government had no right to then claim that Indictment I tolled the running of the statute of limitations.[3]

Bolden also sought dismissal of counts seven and eight of indictment II, the tax evasion counts for the years 1979 and 1980, on the ground that they did not state a violation of 26 U.S.C. section 7201, because they failed to allege an "affirmative act constituting an evasion or attempted evasion of the tax. . . . " *Sansone vs. United States*, 380 U.S.343, 351 (1965).

Unlike counts five and six, counts seven and eight did not allege that Bolden filed a false income tax return for the years in question, but that he attempted to evade and defeat the tax due by

> [1] failing to make such income tax return to the Internal Revenue Service, [2] by failing to pay to the United States of America the said income tax, and [3] by concealing and attempting to conceal from all proper officers of the United States of America his and true and correct taxable income.

While conceding that the allegations in counts seven and eight made out an offense under 26 U.S.C. section 7203, the misdemeanor "failure to file" statute, Bolden

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[3]Bolden did not claim, as the Court of Appeals stated in its opinion, that he was prejudiced by the twenty two days which elapsed between the return of the two indictments.

felt that the third accusation—that he committed an affirmative act of tax evasion by concealing his true income—was a legal conclusion, and was redundant to the first two acts.

The motions to dismiss were denied. On October 9, 1984, Bolden entered a guilty plea to counts one and eight of the indictment, and with the consent of the government and the court he reserved his right to appeal the District Court's rulings denying the motions to dismiss.[4] The remaining counts were dismissed on motion of the government, as part of the plea agreement.

This Petition for Writ of Certiorari poses the "interesting question as to whether a taxpayer who does not file a return may be prosecuted under 26 U.S.C. section 7201", *United States vs Edwards*, 777 F.2d 644, 650 (11th Cir.1985).[5] It also seeks an interpretation of the proper use of Rule 6(e)(4), and whether it may be used by the government for its own convenience, rather than for its stated purpose.

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[4]Federal Rule of Criminal Procedure 11(a)(2) provides, in part:

> With the approval of the Court and consent of the government, a defendant may enter a conditional plea of guilty, or nolo contendere reserving in writing, the right, on appeal from the judgment, to review of the adverse determination of any pretrial motion. . . .

[5]Norman C. Edwards was a co-appellant in the appeal, and his name appears first in the opinion.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS TWO IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION WHICH HAVE NOT BEEN, BUT MUST BE, SETTLED BY THIS COURT.

I

The construction given to 26 U.S.C. section 7201 by the court below conflicts with the pronouncements of this Court in *Sansone vs. United States*, 380 U.S. 343 (1965). In *Sansone*, the Court stated that section 7201 requires "willfulness . . . together with the existence of an affirmative act constituting an evasion or attempted evasion of the tax. . . . " *Id.* at 351. This affirmative act requires "some willful commissions in addition to the willful omissions that make up the list of misdemeanors." *Spies vs. United States*, 317 U.S. 492, 499 (1943).[6]

The allegation in the indictment that Bolden concealed, or attempted to conceal, his "true and correct taxable income" is a conclusion which is, at best, another way of saying that he did not file a tax return or pay the taxes owing, or at worst, is the end result of his failure to do either.

> The teaching of the Spies case is that in order to sustain a conviction under the felony statute

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[6]26 U.S.C. section 7203, the "failure to file" misdemeanor statute "requires only willfulness and the omission of the required act [the payment of the tax or the filing of the return]. *Sansone vs. United States*, 380 U.S. 343, 351 (1965).

> something more than a violation of the misdemeanor statute must be shown, some conduct, "the likely effect of which would be to mislead or conceal."

Clay vs. United States, 218 F.2d 483, 485-486 (5th Cir. 1955) (Citations omitted).

The language of *Clay* shows that "to mislead" or "conceal" is a conclusion which will not support a violation of section 7201.

The defendants in *Clay* were convicted of willfully evading the occupational wagering tax, a felony. The government attempted "to test its theory that it can 'make out a felony violation . . . in a failure to pay situation.'" *Id.* at 485. The government bottomed its theory on the claim that the allegations and proof necessary for the "failure to file or pay" misdemeanor statute would be sufficient to sustain a felony conviction if the indictment alleged that the defendants attempted "to evade rather than [failed] to pay." *Id.* The Court was unmoved:

> In the absence of additional facts, the conclusion of the pleader that this [failure to pay] was done as a willful attempt to evade payment of the tax adds nothing to the indictment. . . . It is fundamental that every essential ingredient of the offense must be alleged with precision and certainty. The present indictment does not meet these tests because it lacks the essential ingredient which "lifts the offense to the degree of felony". . . . The addition of mere legal conclusions, unaided by essential allegations

of fact to support them will not supply the ingredient.

Id. at 486.

II

A statute of limitations expresses the intent that criminal defendants be timely notified of the charges against them. *Toussie vs. United States*, 397 U.S. 112, 114-115 (1970); *United States vs. Marion*, 404 U.S. 307, 322-323 (1971). "Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.'" *United States vs. Marion*, *supra* at 322 (citation omitted). Since indictment I, which charged Bolden with the four marijuana-related offenses, was improperly sealed, the statute of limitations was not tolled. Thus, the corresponding counts of the superseding indictment, filed after the statute had run, were time barred, and Bolden's motion to dismiss the first four counts of the superseding indictment should have been granted.

Indictment I was ordered sealed pursuant to Federal Rule of Criminal Procedure 6(e)(4), which permits a Federal Magistrate to seal an indictment until a defendant is in custody or released pending trial. The power granted by Rule 6(e)(4) "is based on the legitimate prosecutorial needs of the government to capture those properly indicted for criminal activity." *United States vs. Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980) (*en banc*).

The record in this case reveals no legitimate prosecutorial need. The Magistrate's decision to seal the indictment immediately after its return was based on the following colloquy:

> THE COURT: [to Government counsel] . . . you have sought to seal this return. What are the reasons for your seeking to seal?
>
> [GOVERNMENT COUNSEL]: Your Honor, my co-counsel, . . . has not been available—has not been able to come down. We anticipate presenting another indictment. We anticipate superseding this indictment with tax counts, and we have advised this Grand Jury—
>
> THE COURT: These gentlemen, they don't know yet as to the—the persons named in the indictment, do they—do they know yet about the nature of the indictment?
>
> [GOVERNMENT COUNSEL]: They know that the investigation is going on, and they know that we're looking into everybody, looking into both violations of the drug and tax offenses.
>
> THE COURT: *Do you feel that they would remain if—if they were to find out about the indictment before their apprehension?*
>
> [GOVERNMENT COUNSEL]: *We are not certain of that, Your Honor, and so we want to take the precaution.*

THE COURT: *Is that the reason for your seeking the order to seal?*

[GOVERNMENT COUNSEL]: *Yes, Your Honor.*

THE COURT: Okay. All right. The Court finds there is reason to seal, and the order to seal is hereby signed, dated. *The return will be sealed until further Order of the Court or the arrest of the first defendant.* (Emphasis added).

But the government neither arrested anyone named in the indictment nor made the slightest effort to secure arrest warrants. The indictment sat in place for almost three weeks until the superseding indictment was filed. Nevertheless, the court below, relying on *United States vs. Southland Corporation*, 760 F.2d 1366 (2d Cir. 1985), decided that the sealing was justified.

In *Southland*, the government obtained an order sealing the indictment on its representation to the court that more time was needed to secure the testimony of an immunized witness. 760 F.2d at 1378. The statute of limitations ran after the indictment was sealed, and before the defendant was arrested. The Court of Appeals in *Southland* rejected the defendant's argument that the only legitimate reason to seal an indictment was to secure a defendant's arrest. The court held that: (1) Reasons other than taking defendants into custody, such as the public interest or sound public policy, can support the sealing of an indictment, and (2) great deference should be accorded to the magistrate's decision to seal an indictment. *Southland, supra* at 1379, 1380.

The court below aligned itself with Southland. *United States vs. Edwards, supra* at 648.

Other than the bald assertion that tolling the statute of limitations on the marijuana-related offenses was "arguably required by the public interest and supported by sound reasons of policy", *Id.* at 648-649, the Bolden opinion offers no reason to defer to the magistrate's ruling.[7] Indeed, if deference were paid to the magistrate's ruling, then Bolden's argument must prevail since the magistrate found that by misstating the true purpose for its motion to seal the indictment, the government denied Bolden timely notice of the charges against him.

[7]The magistrate found, at a subsequent hearing, that the government misstated the purpose for sealing the indictment:

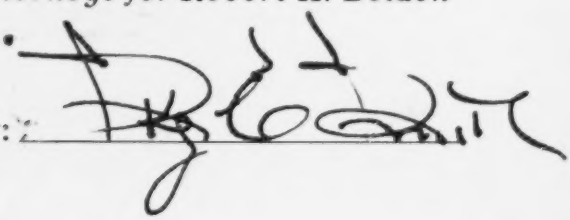
> The indictment was sealed, and the Government apparently was not totally candid with the Court in its request to seal as no present intent to prosecute or obtain the defendant's presence before the Court is evident from the file.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

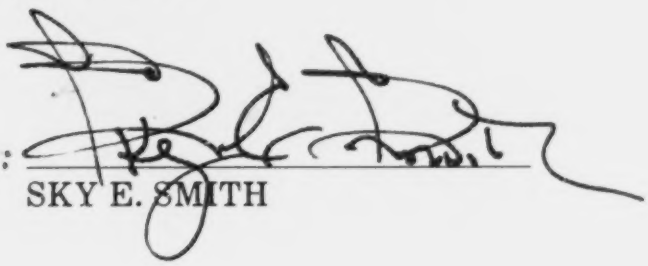
Respectfully submitted,

SKY E. SMITH
SMITH AND GELLMAN
2400 South Dixie Highway
Miami, Florida 33133
(305) 858-1400
Attorneys for Robert H. Bolden

By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of March, 1986, three copies of the foregoing Petition for Certiorari were served by United States Mail upon The Solicitor General of The United States, Department of Justice, Washington, D.C. 20530; MICHAEL L. PAUP, ESQUIRE, Appellate Section, Tax Division, United States Department of Justice, Box 468, Washington, D.C. 20044; and two copies to HARVEY E. EISENBERG, United States Department of Justice, Tenth and Pennsylvania Avenue, Washington, D.C. 20530.



SKY E. SMITH

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Norman C. EDWARDS, Jr.,
Robert H. Bolden, Jr.,
Defendants-Appellants.

No. 84-5968.

United States Court of Appeals,
Eleventh Circuit.

Dec. 6, 1985.

* * *

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN,* District Judge.

WALTER E. HOFFMAN, District Judge:

A four-count indictment on March 2, 1984, charged defendants Norman C. Edwards, Jr. and Robert H. Bolden, Jr. with conspiracy to import and to possess with intent to distribute marijuana, in violation of 18 U.S.C. §2, and 21 U.S.C. §§ 841(a)(1), 846, 952(a), 960, and 963. Upon the government's motion, this indictment was immediately sealed.

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*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

On March 22, 1984, a superseding indictment realleged the four counts of the original indictment and added numerous tax-related counts. Counts VII and VIII charged Bolden with violations of 26 U.S.C. §7201, attempting to evade and defeat income taxes due the United States. Counts IX, X and XI charged Edwards with violations of 26 U.S.C. §7206(1), willfully subscribing tax returns which he did not believe to be true and correct. Upon the government's motion, the superseding indictment was also sealed. Bolden and Edwards were arrested on March 22, 1984.

The district court affirmed and adopted the recommendations of the magistrate that the defendants' various motions to dismiss be denied. On October 4, 1984, Edwards entered into a plea agreement with the government, pleading guilty to one drug and one tax count in exchange for the government's dismissing the remaining counts at the time of sentencing. Subject to the court's permission and pursuant to Fed.R.Cr.P. 11(a)(2), the parties agreed that Edwards could appeal the court's denial of his motion to dismiss. On October 9, 1984, Bolden entered into a similar plea agreement, likewise preserving his right to appeal the denial of his motion to dismiss.

The district court accepted Edwards' and Bolden's conditional guilty pleas. On December 13, 1984, Bolden was sentenced to 48 months of imprisonment followed by a two-year special parole term and a fine of $15,000 on the drug charge. On the tax charge, Bolden is placed on five years probation to be served upon completion of his sentence. Additionally, Bolden must pay a fine of $10,000 and perform 400 hours of community service

annually during his probation period.[1] The court sentenced Edwards to 30 months of imprisonment on the drug charge, followed by a two-year special parole term. Upon completion of the drug sentence, Edwards is placed on probation for three years on the tax count, must pay a $5,000 fine, and must perform 400 hours of community service annually during the probation period.[2]

We affirm the judgments of conviction, based upon the conditional pleas of guilty in these cases which have been consolidated for appellate purposes.

DISCUSSION

Sealed Indictment

[1] Defendants assert that Counts I through IV found in the first indictment and realleged in the second

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[1]The actual language of the order states, in pertinent part: "ORDERED AND ADJUDGED that imposition of sentence of confinement shall be withheld as to Count Eight and upon completion of defendant's sentence as to Count One and any parole term which may occur, the defendant shall be placed on probation for a period of FIVE (5) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964, and upon the following special conditions of probation:" (R.471) However, since sentences must be imposed immediately and not withheld, we construe the quoted language to mean that Bolden's sentence of probation was imposed on December 13, 1984.

[2]The actual language of Edwards' sentence also indicates that imposition of sentence is withheld. (R.473) We construe this language to mean that the sentence of probation was imposed on December 13, 1984.

indictment should be dismissed as time barred by 18 U.S.C. §3282.[3] When the grand jury returned the first indictment on March 2, 1984, four days remained before the five-year deadline expired on the drug charges.[4] The superseding indictment, returned March 22, 1984, was brought sixteen days after the expiration of the five-year statute of limitations as to the drug counts; the tax counts have a six-year limitation. The original indictment was clearly timely filed. In general, a statute of limitations is tolled by the timely filing of an indictment. *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976).

[2] Furthermore, the government may properly request the sealing of an indictment for a period beyond the statute of limitations. An indictment sealed pursuant to Fed.R.Cr.P. 6(e)(4)[5] is timely even though the defendant

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[3]18 U.S.C. §3282 states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

[4]The last overt act relevant to these cases is alleged to have occurred on March 6, 1979.

[5]Fed.R.Cr.P. 6(e)(4) states:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

is not arrested and the indictment is not made public until after the end of the statutory limitations period. *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981); *United States v. Michael*, 180 F.2d 55 (3d Cir. 1949), *cert. denied, sub nom., United States v. Knight*, 339 U.S. 978, 70 S.Ct. 1023, 94 L.Ed. 1383 (1950). Therefore, the government's actions in requesting the sealing of the original indictment are consistent with those contemplated under the aegis of Fed.R.Cr.P. 6(e)(4).

Defendants also assert that the government's reasons for seeking to seal the original indictment were improper. Both Edwards and Bolden maintain that an indictment may not be sealed for the government's convenience and contend that the government's actions deprived them of due process. *See United States v. Watson*, 599 F.2d 1149, 1155 (2d Cir.1979), *modified sub nom. United States v. Muse*, 633 F.2d 1041 (2d Cir.1980) (*en banc*), *cert. denied*, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981) (government may not request the sealing of an indictment for more than a reasonable time after statute of limitations has expired). Edwards argues that the government had no legitimate prosecutorial need to seal the original indictment and asserts that Counts I through IV consequently should be dismissed. In support of this argument, Edwards relies upon a narrow interpretation of Fed.R.Cr.P. 6(e)(4), that the only valid reasons for sealing an indictment are to locate and to gain custody over defendant. *See, e.g., Watson*, 599 F.2d at 1155; *United States v. Cosolito*, 488 F.Supp. 531 (D.Mass.1980); *United States v. Sherwood*, 38 F.R.D. 14, 20 (D.Conn.1964). We do not accept this

limiting interpretation of the Federal Rules of Criminal Procedure

Prosecutorial Purpose

A recent decision of the Second Circuit addresses precisely the issue raised in this appeal: what reasons justify the sealing of an indictment. In *United States v. Southland*, 760 F.2d 1366 (2d Cir.1985), Judge Friendly provides an analytical and historical perspective to Fed.R.Cr.P. 6(e)(4). *Southland* cites an opinion by Judge Maris written only three years after the Criminal Rules were adopted:

> Criminal Procedure Rule 6(e) authorizes indictments to be kept secret during the time required to take the defendant into custody. If such secrecy may lawfully be imposed in that situation we see nothing unlawful in the court imposing secrecy in other circumstances which in the exercise of a sound descretion it finds call for such action.

United States v. Michael, 180 F.2d 55, 57 (3d Cir.1949), *cert. denied sub nom. United States v. Knight*, 339 U.S. 978, 70 S.Ct. 1023, 94 L.Ed. 1383 (1950). Judge Friendly concludes that the *Michael* court would scarcely have made the statement if the taking of custody had been the sole objective of Fed.R.Cr.P. 6(e)(4). *Southland*, 760 F.2d at 1379.

[3] *Southland* continues its historical analysis by delving into the practice of the courts at the time the Rule was written and concludes that courts then ordered

an indictment to be sealed, "[W]here the public interest requires it, or for other sufficient reason,"[6] or "for sound reasons of policy."[7] *Southland*, 760 F.2d at 1379, 1380. Judge Friendly also explains that the Federal Rules of Criminal Procedure were not meant to be exhaustive. Therefore, that the Rule omits an enumeration of the reasons for which an indictment may be sealed is not to be read as a restriction on those reasons. In sum, reasons other than taking defendants into custody validly support the sealing of an indictment.

Magistrate's Decision

In the present case, we must decide whether the prosecutorial needs and objectives justified the sealing of the indictment. Again, the words of Judge Friendly are instructive:

> This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of

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[6]Hansel & Walser, *Defending and Prosecuting Federal Criminal Cases* §230, at 300 (2d ed. 1946); *accord* 1 Matthews, *How to Try a Federal Criminal Case* §215, at 318-19 (1960).

[7]These words were used to describe present practice by Judge George Medalie, Associate Judge of the New York Court of Appeals, former United States Attorney for the Southern District of New York and member of the Supreme Court Advisory Committee on Criminal Rules. The occasion was a symposium on the Rules of Criminal Procedure sponsored by the New York University School of Law, the American Bar Association, and the Federal Bar Association. VI *Proceedings of the New York University Law School Institute on the Federal Rules of Criminal Procedure*, 155 (1946).

> substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible.

Southland, 760 F.2d at 1380. Defendants argue at length that the colloquy which transpired between the magistrate and the government counsel regarding the need to seal the indictment is reflective of an improper purpose, *i.e.*, a purpose other than the need to take the defendant into custody. In fact, the record shows that the magistrate does suggest that an appropriate procedure would have been to have arrested the defendants on the original indictment and later to have superseded that indictment with a second which added the tax counts. The tax counts are subject to a six-year statute of limitations and, unlike the drug counts, were not threatened by a time bar, on March 2, 1984.

[4] If, as Edwards argues, the magistrate recognized that the government's only reason for filing the original indictment was to toll the running of the statute of limitations, the magistrate nonetheless granted the government's motion to seal the indictment. We align ourselves with the Second Circuit in according great deference to the discretion of the magistrate. Tolling the statute of limitations on charges of conspiracy to import with intent to distribute thousands of pounds of marajuana is arguably required by the public interest

and supported by sound reasons of policy. We uphold the discretion of the magistrate in this decision and find that her suggestion of an alternative procedure is not necessarily indicative of a questionable prosecutorial objective.

Actual Prejudice

[5] The plethora of cases which the defendants cite in support of their motion to dismiss the counts allegedly time barred contain a common thread. Courts have dismissed indictments maintained under seal beyond the limitation period only upon a showing of substantial, irreparable, actual prejudice to the defendants. *See e.g., United States v. Watson*, 599 F.2d 1149 (2d Cir.1979), *(en banc) modified sub nom. United States v. Muse*, 633 F.2d 1041 (2d Cir.1980), *cert. denied*, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981); *United States v. Slochowsky*, 575 F.Supp. 1562 (E.D.N.Y.1983); *United States v. Cosolito*, 488 F.Supp. 531 (D.Mass.1980); *United States v. Heckler*, 428 F.Supp. 269 (S.D.N.Y.1976). In the present case, the magistrate found no prejudice to the defendants. Athough the defendants allege that they were prejudiced by the twenty-day sealing of the indictment, they make no factual showing as to the inaccessibility of witnesses, the diminution of memories, or other indicia of actual prejudice. Therefore, we find that the defendants were in no way prejudiced by the sealing of the indictment and that the twenty-day sealing was not an unreasonable prosecutorial delay.

Superseding Indictment

[6] The government's superseding indictment, returned March 22, 1984, realleged precisely the drug

charges. Counts I through IV, and added tax charges. Counts VII through XI which are relevant to this appeal. Clearly, a prosecutor may seek a superseding indictment at any time prior to trial on the merits, so long as the purpose is not to harass the defendant. *United States v. Del Vecchio*, 707 F.2d 1214, 1216 (11th Cir.1983). The record indicates no governmental intent to harass either defendant by the superseding indictment.

[7] Defendants contend that the superseding indictment is impermissible because it broadens and substantially amends the charges made in the original indictment. *United States v. Grady*, 544 F.2d 598, 602 (2d Cir.1976). However, the superseding indictment realleged exactly the charges brought in Counts I through IV of the original indictment. These counts were neither broadened nor amended and, therefore, do not violate the *Grady* guidelines. As previously established, these drug charges were timely brought and the indictment properly sealed for a reasonable time.

The tax charges against the defendants added in Counts V through XI are subject to a six-year statute of limitations[8] and were timely brought in the superseding indictment. These added charges did not improperly broaden or amend the original charges and did not violate the guidelines of *Grady*, 544 F.2d at 602. *See*

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[8]26 U.S.C. §6531 says in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the

also United States v. Friedman, 649 F.2d 199, 204 (3d Cir.1981) (substantial alteration of the charges); *United States v. O'Neill*, 463 F.Supp. 1205, 1207 (E.D.Pa.1979) (substantial amendment of the original indictment). The tax charges did put the defendants on notice, in a timely manner, of those charges against which they had to defend. *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 859-60, 25 L.Ed.2d 156 (1970). The superseding indictment is, therefore, entirely appropriate; the charges therein should not be dismissed.

Misdemeanor or Felony

Defendant Bolden poses an interesting question as to whether a taxpayer who does not file a return may be prosecuted under 26 U.S.C. §7201.[9] Bolden maintains that Counts' VII and VIII of the superseding

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(Footnote 8 Continued)

> commission of the offense, except that the period of limitation shall be 6 years.
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner; . . .
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

[9]26 U.S.C. § 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .

indictment do not charge violations of §7201 because they do not allege any affirmative act constituting an evasion or attempted evasion of tax. Bolden concedes that the two counts contain appropriate language to permit his conviction under the misdemeanor statute for willful failure to file a tax return or pay a tax, §7203.[10]

[8] The test to determine the adequacy of an indictment is set forth in *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974):

> . . . an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

Additionally, an indictment that adheres to the language of the statute is generally sufficient so long as the indictment sets forth the essential elements of the crime. *Hamling*, 418 U.S. at 117, 94 S.Ct. at 2907; *United States v. Harrell*, 737 F.2d 971, 975 (11th Cir.1984), *cert.*

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[10]26 U.S.C. § 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . .

denied, ____ U.S. ____, 105 S.Ct. 1392, 84 L.Ed.2d 781 (Sup.Ct.1985); *United States v. Ramos*, 666 F.2d 469, 474 (11th Cir.1982).

[9, 10] The essential elements that must be established to prove a violation of §7201 are willfullness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965). Thus, the essential elements stated in Bolden's indictment are that he (1) failed to make a return and (2) failed to pay the tax (3) by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income. The primary inquiry focuses upon the third element. Does the allegation of concealing or attempting to conceal income charge an affirmative act of tax evasion and not state a mere legal conclusion as Bolden contends? Our inquiry is whether concealing income is a distinct form of conduct made criminal with respect to which the requisite criminal intent of willfullness exists. *U.S. v. Platt*, 435 F.2d 789, 793 (2d Cir.1970). We find that concealing income, alleged in the conjunctive with other acts in Counts VII and VIII, is a willful commission as required by §7201.

Bolden relies on *United States v. McNulty*, 528 F.2d 1223 (9th Cir.1976), cert. denied, 425 U.S. 972, 96 S.Ct. 2170, 48 L.Ed.2d 796, as an example of a proper indictment for an affirmative act of concealment of income. The *McNulty* court observed that the indictment charged "with particularity the times, the amounts, and the methods and manner by which McNulty sought to willfully and knowingly attempt to evade and defeat said income tax. . . . " *McNulty*, 528 F.2d at 1225.

However, in revenue offenses, an allegation of the particular means by which the defendant attempted to evade and defeat the tax is not required. *Reynolds v. United States*, 225 F.2d 123, 126 (5th Cir.1955), *cert. denied*, 350 U.S. 914, 76 S.Ct. 197, 100 L.Ed. 801 (1955); *United States v. Miro*, 60 F.2d 58, 60-61 (2d Cir.1932); *Capone v. United States*, 56 F.2d 927, 931 (7th Cir.1932), *cert. denied*, 286 U.S. 553, 52 S.Ct. 503, 76 L.Ed. 1288 (1932). Additionally, language substantially similar to that used in Counts VII and VIII of the present case has been held sufficient to allege a violation of §7201. *Elwert v. United States*, 231 F.2d 928, 931-32 (9th Cir.1956). Consequently, we find that Counts VII and VIII adequately allege an affirmative act of tax evasion as required by §7201 and hold that defendant Bolden's plea of guilty on Count VIII is affirmed.

Privilege Against Self-Incrimination

Defendant Edwards appeals the district court's denial of his motion to dismiss Counts IX, X, and XI of the superseding indictment. These counts allege violations of 26 U.S.C. §7206(1).[11] Edwards argues first that the three counts violate his Fifth Amendment privilege

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[11]26 U.S.C. §7206(1) provides in pertinent part:

> Any person who—
> (1) *Declaration under penalties of perjury.* —Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter, . . . shall be guilty of a felony. . . .

against self-incrimination. Edwards is charged with willfully filing an income tax return that he did not believe to be true and correct as to every material matter. The government asserts that Edwards understated the amount of his income by failing to disclose that he had received substantial gross receipts from the distribution of marijuana.

[11] Edwards argues that he may apply the Fifth Amendment privilege against self-incrimination in not revealing either the source or the amount of his income, citing *Garner v. United States*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) and *United States v. Paepke*, 550 F.2d 385 (7th Cir.1977). What Edwards fails to acknowledge are the limited circumstances under which a taxpayer may decline to state the amount of his income, *i.e.*, when the amount alone might have incriminated him. The facts of Edward's situation do not support such a position. As the court noted in *Paepke*, the defendant had a choice; he could have listed the amount of his income, paid the proper tax, and claimed the Fifth Amendment privilege as to its source. *Paepke*, 550 F.2d at 391.

Since Edwards failed to disclose not only the source of but also the amount of substantial gross receipts, he may not rely on those cases which hold that the source of income may be privileged. *United States v. Goetz*, 746 F.2d 705, 710 (11th Cir.1984); *United States v. Vance*, 730 F.2d 736, 738 (11th Cir.1984); *United States v. Pilcher*, 672 F.2d 875 (11th Cir.1982), *cert. denied*, 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982); *United States v. Booher*, 641 F.2d 218, 220 (5th Cir.1981); *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir.1978), *rehearing denied*, 584 F.2d 389 (5th Cir.1978). Uniformly, these

cases also held that the amount of a taxpayer's income is not privileged. Therefore, Edwards Fifth Amendment argument is without merit.

Burden of Proof

[12] Edwards' contention that the prosecution unconstitutionally shifted the burden of proof onto him to prove his innocence is also unsuccessful and frivolous. In order to sustain a conviction under 26 U.S.C. §7206(1), the government must prove that: (1) there was a making and subscribing of a tax return which contained a written declaration that it was made under the penalties of perjury; (2) the maker or subscriber did not believe the return to be true and correct as to every material matter; and (3) the maker or subscriber acted in a willful, as opposed to a negligent manner. *See United States v. Fontenot*, 628 F.2d 921 (5th Cir.1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 406 (1981); *Hoover v. United States*, 358 F.2d 87 (5th Cir.1966), *cert. denied*, 385 U.S. 822, 87 S.Ct.50, 17 L.Ed.2d 59 (1966). The courts have also provided examples of material false statements. *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir. 1978), *cert. denied* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978) (failure to report substantial gross receipts); *United States v. Garcilaso de la Vega*, 489 F.2d 761, 765 (2d Cir.1974) (failure to report income from an illegal business); *United States v. DiVarco*, 343 F.Supp. 101, 103-104 (N.D.Ill. 1972), *aff'd*, 484 F.2d 670 (7th Cir.1973), *cert. denied* 415 U.S. 916, 94 S.Ct. 1412, 39 L.Ed.2d 470 (1974) (failure to report correctly the source of income). Once the prosecutor has met his burden of proof with regard to each of these elements, the government has established a prima

facie case under §7206(1). However, in the present case, which never came to trial because the defendant pleaded guilty, the allegation that the government shifted the burden of proof by claiming that the defendant was in the business of selling drugs in an income tax case is an irrelevant argument.

Notice

[13] Edwards also alleges a violation of the right to be placed on notice in regard to what is illegal conduct pursuant to §7206(1). In his brief, defendant claims that he was charged with failing to disclose substantial gross receipts on Schedule C and that Schedule C is not a requirement of the Internal Revenue Code or Regulations. The relevant wording of Counts IX, X, and XI alleges that Edwards "failed to disclose, on an attached schedule C, *or otherwise*, that . . . [he] had received. . . . substantial gross receipts from a business activity . . ." (Emphasis added). The critical element of the counts is Edwards' failure to disclose, not his failure to use Schedule C. In regard to another defendant's failure to file or filing of false and fradulent Schedules E and F, a court noted:

> While there is no explicit requirement in the regulations for the completion and filing of Schedules E and F, it is implicit in required Form 1040 that such schedules, when appropriate, become integral parts of such form and are incorporated therein by reference. . . . Therefore, we conclude that section 7206(1) required the same duty of honest reporting on schedules as it requires for entries on the Form proper.

United States v. Taylor, 574 F.2d 232, 237 (5th Cir.1978). By analogy, we reason that the holding in *Taylor* applies to Schedule C as well. Edwards' reliance on *United States v. Levy*; 533 F.2d 969, 970-971 (5th Cir.1976), to support his argument that no internal revenue law or regulation requires the filing of a Schedule C is, therefore, misplaced.

For the reasons stated above we **AFFIRM** the judgments of conviction of Norman C. Edwards, Jr. and Robert H. Bolden, Jr.